Ooi Kean Thong & Anor v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL REFERENCE NO 06–2 OF 2005 (W)
AHMAD FAIRUZ CHIEF JUSTICE, ALAUDDIN AND RICHARD MALANJUM FCJJ
25 APRIL 2006

Administrative Law — Subsidiary legislation — By laws ultra vires — Whether s 102 of the Local Government Act 1976 wide enough to include the power to legislate that person found behaving in a disorderly manner in any park commits an offence — Whether there had been deprivation of applicants constitutional right of freedom — Federal Constitution art 5(1)

Constitutional Law — Fundamental liberties — Equality before the law — Whether there had been a breach of Federal Constitution art 8(1)

Statutory Interpretation — Constitution — Fundamental liberties — 'Right to livelihood' — Whether disallowing any person from behaving in disorderly manner is a deprivation of one's life or livelihood or reputation — Federal Constitution art 5(1)

The applicants were accused of behaving in a disorderly manner, to wit, 'berpeluk dan bercumbu' ('hugging and kissing') and thus alleged by DBKL to be an offence under s 8(1) of the Parks (Federal Territory) By-laws 1981 ('the by-law'). The matter was referred to the Municipal Court for its disposal where the applicants decided not to pay the fines imposed by DBKL. It is still pending there. With the consent of the public prosecutor, the applicants brought an issue before the High Court on a constitutional point and requested that the question be referred to the Federal Court pursuant to s 84(1) of the Courts of Judicature Act 1964. The issue is whether s 8(1) of Park (Federal Territory) 1981 is ultra vires s 102 of the Local Government Act 1976 and the effect is that the applicants have been deprived of their constitutional right of freedom and whether the charge against them is contrary to art 5(1) of the Federal Constitution.

Held:

(1) With a written constitution, it should be noted that for a subsidiary legislation to be intra vires, it must be within the ambit of the parent act as well as not inconsistent with any of the provisions in the Federal Constitution. Thus, when substantive ultra vires as a ground is relied upon the function of the court is basically threefold: 'first, to determine the meaning of the words used in the Act of Parliament itself to describe the subordinate legislation

which that authority is authorized to make, secondly, to determine the meaning of the subordinate legislation itself and finally to decide whether the subordinate legislation complies with that description.' — per Lord Diplock in *McEldowney v Forde* [1969] 2 All ER 1039 followed (see para 17).

(2) Based on the general nature of the first part of s 102 of the Local Government Act 1976 and in particular with the phrase 'as are necessary or desirable for the maintenance of the health, safety and well-being of the inhabitants or for the good order and government of the local authority area' and applying the connectivity test between the objects of the impugned by-law and s 102, the 'connection contemplated is real and proximate, not far-fetched or problematical'. In other words, the general nature of the section is wide enough to cover such matter as dealt with in the impugned by-law (see para 24); *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 followed.

(3) Paragraph (f) read with paragraph (t) of s 102 of the Local Government Act 1976 is wide enough to include the power to legislate the impugned by-law. The Parks (Federal Territory) By-laws 1981 quite obviously were enacted in relation to 'the establishment, regulation and management of' a public park. Hence, the impugned by-law which makes it an offence for any person to behave in a disorderly manner in any of the public parks of DBKL is no more than another rule laid down by DBKL to regulate its public park (see para 28).

(4) In respect of art 5(1), the applicants were never arrested or detained. As such, there is no question of deprivation of rights, life or personal liberty taking the meaning of that clause in a narrower sense (see *Aminah v Superintendent of Prison, Pengkalan Chepa, Kelantan* [1968] 1 MLJ 92). Even accepting the broad interpretation of the word 'life' in cl (1) of the said article to mean 'right to livelihood' which includes deprivation of one's reputation (see *Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281), the court cannot by any stretch of imagination conclude that by disallowing any person from behaving in disorderly manner as the impugned by-law stipulates, is a deprivation of one's life or livelihood or reputation. To do so would result in chaos to our society which is anathema to the concept of a civilized community (see paras 41, 44).

(5) For now, the court is not considering specifically whether kissing or hugging in the public park of DBKL is within the ambit of the impugned by-law. That is for the trial court to decide applying matured consideration and thereafter any aggrieved party to the case has the right of appeal to the higher courts of this country (see para 43).

(6) Reliance on art 8 has no merit as there is no assertion that the applicants were singled out by DBKL in relation to the enforcement of the impugned by-law. There was also no allegation that irrelevant consideration was taken into account when DBKL decided to issue the summons to the applicants (see para 47).

[Bahasa Malaysia summary

Pemohon-pemohon dituduh berkelakuan dengan cara tidak sopan, 'berpeluk dan bercumbu' dan oleh itu dikatakan oleh DBKL sebagai satu kesalahan di bawah s 8(1)

Undang-Undang Kecil Taman (Wilayah Persekutuan) 1981 ('undang-undang kecil'). Perkara tersebut telah dirujuk kepada Mahkamah Perbandaran untuk penyelesaiannya di mana pemohon-pemohon memutuskan untuk tidak membayar denda yang dikenakan oleh DBKL. Dengan persetujuan pendakwa raya, pemohon-pemohon telah mengemukakan satu persoalan di hadapan Mahkamah Tinggi berhubung perkara perlembagaan dan memohon agar persoalan itu dikemukakan ke Mahkamah Persekutuan menurut s 84(1) Akta Kehakiman Mahkamah 1964. Persoalannya adalah sama ada s 8(1) undang-undang kecil ultra vires s 102 Akta Kerajaan Tempatan 1076 dan akibatnya adalah pemohon-pemohon terkilan akan hak perlembagaan berhubung kebebasan mereka dan sama ada pertuduhan terhadap mereka adalah bertentangan dengan pekara 5(1) Perlembagaan Persekutuan.

Diputuskan:

(1) Berdasarkan perlembagaan bertulis, perlu ditekankan bahawa untuk suatu perundangan subsidiari itu menjadi intra vires, ia hendaklah terangkum dalam skop akta utama dan juga konsisten dengan mana-aman peruntukan dalam Perlembagaan Persekutuan. Oleh itu apabila ultra vires yang substantif sebagai satu alasan digunakan fungsi mahkamah pada amnya terbahagi kepada tiga: 'first, to determine the meaning of the words used in the Act of Parliament itself to describe the subordinate legislation which that authority is authorized to make, secondly, to determine the meaning of the subordinate legislation itself and finally to decide whether the subordinate legislation complies with that description.' — oleh Lord Diplock dalam *McEldowney v Forde* [1969] 2 All ER 1039 diikut (lihat perenggan 17).

(2) Berdasarkan sifat am bahagian pertama s 102 Akta Kerajaan Tematan 1971 dan khususnya ungkapan 'as are necessary or desirable for the maintenance of the health, safety and well-being of the inhabitants or for the good order and government of the local authority area' dan dengan menggunakan ujian kesalinghubungan antara objek-objek undang-undang kecil yang dipersoalkan dan s 102, 'connection contemplated is real and proximate, not far-fetched or problematical'. Dalam erti kata lain, sifat am seksyen itu adalah luas untuk merangkum perkara sedemikian sepertimana yang dikendalikan dalam undang-undang kecil yang dipersoalkan tersebut (lihat perenggan 24); *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 diikut.

(3) Perenggan (f) dibaca dengan perenggan (t) s 102 Akta Kerajaan Tempatan 1976 adalah luas meliputi kuasa untuk menggubal undang-undang kecil yang dipersoalkan. Undang-Undang Kecil Taman (Wilayah Persekutuan) 1981 dengan jelas digubal berkaitan dengan 'the establishment, regulation and management of' taman awam. Justeru itu, undang-undang kecil yang dipersoalkan yang menjadikan ia satu kesalahan terhadap sesiapa yang berkelakuan dengan cara tidak sopan dalam mana–mana taman awam DBKL adalah cuma satu lagi peraturan yang dibentangkan oleh DBKL untuk mengawal taman awam (lihat perenggan 28).

(4) Berhubung perkara 5(1), pemohon-pemohon tidak ditangkap atau ditahan. Oleh itu, tiada persoalan tentang kehilangan hak-hak, kehidupan atau

kebebasan peribadi dengan mengambil maksud fasal itu secara terhad (lihat *Aminah v Superintendent of Prison, Pengkalan Chepa, Kelantan* [1968] 1 MLJ 92). Jikapun dengan menerima tafsiran luas perkataan 'life' dalam kl (1) artikel tersebut bermaksud 'right to livelihood' yang termasuklah kehilangan reputasi seseorang (lihat *Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281), mahkamah tidak boleh memutuskan bahawa dengan tidak membenarkan sesiapa berkelakuan dengan cara tidak sopan seperti undang-undang yang dipersoalkan tetapkan, adalah suatu yang melenyapkan kehidupan atau punca pendapatan atau reputasi seseorang itu. Dengan berbuat demikian akan mengakibatkan keadaan kelam kabut dalam masyarakat ini yang dikutuk dalam konsep masyarakat yang bertamadun (lihat perenggan 41, 44).

(5) Buat masa ini, mahkamah tidak akan menimbangkan dengan khusus sama ada bercium atau berpeluk di taman awam DBKL terangkum dalam undang-undang kecil yang dipersoalkan itu. Ia adalah untuk mahkamah perbicaraan untuk membuat keputusan dengan menggunakan pertimbangan yang matang dan seterusnya mana-aman pihak yang terkilan dalam kes itu mempunyai hak untuk merayu ke mahkamah tertinggi negara ini (lihat perenggan 43).

(6) Pergantungan pada perkara 8 tiada merit kerana tiada penegasan bahawa pemohon-pemohon dipilih oleh DBKL berkaitan penguatkuasaan undang-undang kecil yang dipersoalkan. Tiada juga pengataan bahawa pertimbangan tidak relevan telah diambilkira apabila DBKL memutuskan untuk mengeluarkan saman kepada pemohon-pemohon tersebut (lihat perenggan 47).]

Notes

For cases on by laws ultra vires, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 890–892.

For cases on equality before the law, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1768–1784.

For cases on constitution generally, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1705–1717.

Cases referred to

Aminah v Superintendent of Prison, Pengkalan Chepa, Kelantan [1968] 1 MLJ 92 (folld)

Comptroller General of Inland Revenue v NP [1973] 1 MLJ 165 (refd)

Kruse v Johnson [1898] 2 QB 91 (refd)

Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal [2000] 3 MLJ 281 (folld)

McEldowney v Forde [1969] 2 All E R 1039 (folld)

Nadarajah v PP [2000] 4 MLJ 373 (refd)

Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd and another appeal [2005] 3 MLJ 97 (distd)

PP v Pung Chen Choon [1994] 1 MLJ 566 (folld)

PP v Su Liang Yu [1976] 2 MLJ 128 (refd)

PP v Tengku Mahmood Iskandar & Anor [1973] 1 MLJ 128 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 84(1)
Federal Constitution arts 5(1), 8
Interpretations Acts 1948 and 1967 s 26
Local Government Act 1976 ss 63, 101, 102, 102(f)
Palm Oil (Research Cess) Order 1979
Palm Oil Research and Development Act 1979 ss 2, 14 (1)
Parks (Federal Territory) By-Laws 1981 ss 8(1), 10

Selvam Shanmugam (Selvam Shanmugam & Partners) for the applicant.
Manoj Kurup (Deputy Public Prosecutor, Attorney Gweneral's Chambers) for the respondent.

Richard Malanjum FCJ (delivering judgment of the court):

INTRODUCTION

[1] The matter before us is a reference by the High Court Kuala Lumpur (Criminal Division) pursuant to s 84(1) of the Courts of Judicature Act 1964. The question posed reads:

> Sama ada s 8(1) Undang-Undang Kecil Taman (Wilayah Persekutuan) 1981 adalah ultra vires s 102 Akta Kerajaan Tempatan 1976 dan kesannya telah melucut kebebasan diri kedua-dua Pemohon disisi Perlembagaan, dan sama ada tuduhan terhadap pemohon-pemohon adalah bertentangan dengan perkara 5(1) Perlembagaan.

Translation:

> (Whether s 8(1) of Park (Federal Territory) 1981 is ultra vires s 102 of the Local Government Act 1976 and the effect is that the applicants have been deprived of their constitutional right of freedom and whether the charge against them is contrary to art 5(1) of the Constitution..

[2] On 3 April 2006, we gave our oral decision. We answered the question posed in the negative. Consequently, we directed that the matter should be remitted back to the High Court for further action.

[3] At the outset and before going any further, it is appropriate for us to highlight one pertinent point. In order to avoid any confusion as to the scope and extent of our decision on the question posed, we wish to state that the issue before us is one of pure law, namely, whether a subsidiary legislation is ultra vires the enabling provision of the parent act. We were not expected to make and we did not make (and we emphasize here that we did not make) any finding of fact on the merit or demerit of the allegations contained in the summons served on the applicants. To have done so, even by way of remark or conjecture, would have been highly prejudicial and improper as that would tantamount to usurping the function of the trial court which

will ultimately have to deal with the matter. Indeed for now as the case is still pending it would be clearly sub-judice to embark on any further discussion as to how the case should be determined.

THE SUMMONS

[4] For the purpose of this judgment and to better understand the circumstances that led the reference to this court, it is apposite to reproduce the allegations contained in the summons served on the applicants by Dewan Bandar Kuala Lumpur ('DBKL').

[5] The summons states:

> Bahawasanya kamu pada 2 Ogos 2003 lebih kurang jam 5.20 petang di bawah rimbunan pokok-pokok di Taman Kuala Lumpur City Centre, Kuala Lumpur, Wilayah Persekutuan telah didapati berkelakuan tidak sopan iaitu berpeluk dan bercumbu dengan seorang lelaki Ooi Kean Thong (No KP: 811119-07-5149) dan dengan yang demikian kamu telah melakukan satu kesalahan di bawah s 8(1) Undang-Undang Kecil Taman (Wilayah Persekutuan) 1981 yang boleh dihukum di bawah s 10 Undang-Undang yang sama.

Translation:

> That you on 2 August 2003 at 5.20pm under the trees at Kuala Lumpur City Centre Park, Wilayah Persekutuan was found behaving in a disorderly manner, to wit, hugging and kissing with a man Ooi Kean Thong (KP No: 811119-07-5149) and thereby committed an offence under s 8(1) of the Parks (Federal Territory) By-Laws 1981 and punishable under s 10 of the same Act.

And

> Bahawasanya kamu pada 2 Ogos 2003 lebih kurang jam 5.20 petang di bawah rimbunan pokok-pokok di Taman Kuala Lumpur City Centre, Kuala Lumpur, Wilayah Persekutuan telah didapati berkelakuan tidak sopan iaitu berpeluk dan bercumbu dengan seorang wanita Siow Ah Wei (No KP: 830323-05-5392) dan dengan yang demikian kamu telah melakukan satu kesalahan di bawah s 8(1) Undang-Undang Kecil Taman (Wilayah Persekutuan) 1981 yang boleh dihukum di bawah s 10 Undang-Undang yang sama.

Translation:

> That you on 2 August 2003 at 5.20pm under the trees at Kuala Lumpur City Centre Park, Wilayah Persekutuan was found behaving in a disorderly manner, to wit, hugging and kissing with a women Siow Ah Wei (KP No: 830323-05-5392) and thereby committed an offence under s 8(1) of the Parks (Federal Territory) By-Laws 1981 and punishable under s 10 of the same Act.

[6] From our reading of the allegations in the summons it is clear that the applicants were accused of behaving in a disorderly manner, to wit, 'berpeluk dan bercumbu' ('hugging and kissing') and thus alleged by DBKL to be an offence under s 8(1)of the Parks (Federal Territory) By-laws 1981 ('the by-law').

A **[7]** Initially, the matter was compounded by DBKL and the applicants were supposed to pay the fines imposed. Subsequently they had a change of mind and decided not to pay the fines as they were strongly of the view that they had committed no wrong in law.

B **[8]** The matter was therefore referred to the Municipal Court for its disposal. It is still pending there. With the consent of the public prosecutor, the applicants brought an issue before the High Court on a constitutional point and requested that the question be referred to this court.

C THE CONTENTIONS

[9] Before us, learned counsel for the applicants submitted several grounds some of which gave us some difficulties in comprehending as they were not formulated in the way we expected from counsel appearing before the apex court of this country. The burden is made heavier in this case since the onus is on the applicants to show
D that the by-law is ultra vires (see *McEldowney v Forde* [1969] 2 All E R 1039). Moreover the actual subject matter in this case, although premature for consideration before us, could attract substantial public interest. Hence it would have been quite reasonable for learned counsel to seek for assistance from such body as the Bar
E Council so that at least its representative could have been present to hear what transpired before us since it has been also the practice of the Bar Council to issue public statements pertaining to decisions of the courts involving individual rights.

[10] The gist of the points raised by learned counsel for applicants were as follows:

F (i) that the powers given to local authorities which include DBKL under s 102 of the Local Government Act 1976 ('the Act') and in particular paras (a)–(u) therein do not include the power to make by-law relating to 'indecent' behavior. Learned counsel strenuously argued that the words 'indecent act' do not appear in any of the paragraphs of the section and in consequence thereof
G the applicants' constitutional rights have therefore been infringed contrary to arts 5(1) and 8 of the Federal Constitution ('the Constitution') since they are denied of their freedom to live in the way they want and DBKL is unfair to them. In fact learned counsel, when asked by the court which limb of art 5 of the Constitution he was relying upon, responded that it was the first limb that is the deprivation of life; and

H (ii) that DBKL in legislating the by-law had glaringly infringed art 5(1) of the Constitution as it failed to take into consideration that Malaysia is a multiracial country thus hugging and kissing in public places should not be deemed wrong and as acts of indecency. Instead, learned counsel suggested that such expression of love should be encouraged.

I **[11]** The learned deputy public prosecutor ('DPP') in his exhaustive written submissions contended that s 102 of the Act amply supports the validity of the by-law. He also referred to several sections in the Act such as ss 63, 101 and 102 of the Act and argued that these provisions lent support to the validity of the by-law.

[12] The learned DPP further submitted that for specific purpose or for special interest a local authority may also enact by-laws pursuant to s 102(f) of the Act which reads:

> to provide for the establishment, regulation and management of any public park, walk, recreation and pleasure ground, garden, swimming pool, lake stadium, historical building or site, public library, art gallery, museum, public theatre, restaurant, hall, assembly room, botanical or zoological garden or aquarium;

[13] Hence, it was argued that under s 102(f) it was therefore within the power of DBKL to regulate the use of any of its own public park.

[14] In respect of art 5 of the Constitution, the learned DPP reiterated that the applicants were never arrested or detained. As such, he submitted that the allegations in the summons for behaving in a disorderly manner in the public park of DBKL should not be interpreted as an infringement of the applicants' personal liberty under the Constitution.

WHETHER THE IMPUGNED BY-LAW IS ULTRA VIRES s 102 OF THE ACT

[15] On the first point submitted by learned counsel for the applicants, it is very much premised on the principle of substantive ultra vires with constitutional implication upon invalidation while the other is directly on a constitutionality issue.

[16] In the area of public law and in particular administrative law, there are judicial pronouncements, local and foreign, which provide for the grounds to rely upon in relation to judicial control of subsidiary legislation. One such ground is whether the parent act or the subsidiary legislation is constitutional or in conformity with the provisions of the Constitution. If it infringes the Constitution itself or any constitutional provision then it is struck down for that reason. But it has to be borne in mind that the courts have been consistently applying the presumption of constitutionality in favour of impugned statutory provision and to succeed the onus is therefore on the party asserting otherwise to show (see *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566; *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128).

[17] Another and more commonly relied upon is whether the subsidiary legislation is ultra vires the parent act or briefly put, whether it is beyond the scope or ambit of the parent act. This is described as substantive ultra vires. But we hasten to add that in Malaysia with a written constitution it should be noted that for a subsidiary legislation to be intra vires it must be within the ambit of the parent act as well as not inconsistent with any of the provisions in the Constitution. Thus, when substantive ultra vires as a ground is relied upon the function of the court is basically threefold: 'first, to determine the meaning of the words used in the Act of Parliament itself to describe the subordinate legislation which that authority is authorized to make, secondly, to determine the meaning of the subordinate legislation itself and finally to decide whether the subordinate legislation complies with that description.' per Lord Diplock in *McEldowney*'s case.

[18] There are of course other grounds available for judicial control of subsidiary legislation such as the rule against retrospectivity, non-exclusion of judicial intervention, non-imposition of charge or financial levy through administrative regulation, unreasonableness, bad faith and procedural ultra vires. However, the resultant effects of these do not necessarily end up in the invalidation of a subsidiary legislation. Rather, they are inclined to limit the applicability of such subsidiary legislation. Anyway, as the grounds relied upon in the present case are limited to substantive ultra vires and on constitutionality these other grounds are therefore not particularly relevant.

[19] It is also interesting to note the skepticism in the success rate of any challenge to a subsidiary legislation. It is pegged very much to the attitude of the courts. One academician puts the judicial attitude as being 'indulgent, rather than a critical, attitude, towards delegated legislation, and it is only rarely that a court will hold a regulation ultra vires On the whole, one can say that judicial review of delegated legislation is more of a symbolic value rather than of much practical value.' (see *Administrative law of Malaysia and Singapore* — MP Jain (3rd Ed) at pp 90–91; *Kruse–v Johnson* [1898] 2 QB 91). This view of course was premised on the outlook of the courts in Britain in particular with the obiter of Lord Guest in *McEldowney*'s case at p 1060 when he disagreed with the contention that it was for the prosecution to show that the regulation was intra vires of the parent act. Instead, the converse should be the true position and he concluded by saying this:

> In the absence of any such challenges of the validity of regulations made in virtue of statutory power, it must be plain that the task of a subject who endeavours to challenge the validity of such a regulation is a heavy one

[20] Reverting to the present case on the challenge against the by-law premised on the substantive ultra vires, the critical question is whether the impugned by-law is covered by or within the scope of s 102.

[21] Section 102 reads:

> General power to make by-laws In addition to the powers of making by-laws expressly or impliedly conferred upon it by any other provisions of this Act every local authority may from time to time make, amend and revoke by-laws in respect of all such matters as are necessary or desirable for the maintenance of the health, safety and well-being of the inhabitants or for the good order and government of the local authority area and in particular in respect of all or any of the following purposes —
>
> (a) to regulate the form in which all estimates, budgets, statements, returns, or other accounts of the local authority shall be drawn up and kept;
>
> (b) to regulate the repairing, cleaning, watering and lighting of streets, roads, canals and bridges;
>
> (c) to regulate, license, restrict, prevent or remove the exhibition of advertisements;
>
> (d) to regulate the planting, preservation and removal of trees, flowers and shrubs in public places;

(e) to provide for the protection from damage or interference of any local authority works or property situated or being in, under or over any public or private place within the local authority area;

(f) to provide for the establishment, regulation and management of any public park, walk, recreation and pleasure ground, garden, swimming pool, lake, stadium, historical building or site, public library, art gallery, museum, public theatre, restaurant, hall, assembly room, botanical or zoological garden, or aquarium;

(g) to regulate within the local authority area the landing and temporary storage of goods upon public quays, wharves and streets, adjacent to any port, or any waterway connected therewith, and to fix the fees to be charged in respect of such temporary storage;

(h) to regulate any public sales held in any public place;

(i) to define the streets or areas within which shops, warehouses, factories or business premises may not be erected, or within which specified trades, businesses or callings may not be established or carried on;

(j) to regulate, license, supervise, restrict or prohibit the playing of musical instruments, singing or performing for profit, in any public place;

(k) to regulate the maintenance. distribution and use of any artificial light, gas or other energy that is supplied by the local authority;

(l) to provide for the establishment, maintenance, regulation and control of public transport services and to prescribe fares to be charged;

(m) to regulate fire brigades and to provide for the conditions of service, administration and discipline of all members thereof;

(n) (i) to regulate, supervise and license trishaws and carts and to prescribe the rates or fares, whether by distance or time within or without the local authority area to be charged for such services, the number of passengers and the weights, dimensions, and nature of the loads to be carried and the mode of construction thereof;

(ii) to prescribe standards of medical and physical fitness and efficiency for the riders, drivers or haulers of trishaws or carts, as the case may be;

(o) to provide for the licensing of bicycles and tricycles;

(p) to provide for the establishment, regulation, inspection and licensing of places of entertainment, public recreation or public resort, and to make regulations governing the means of ingress to and egress from such places and for providing adequate parking space adjacent or in reasonable proximity thereto;

(q) to prohibit, restrict or regulate the transportation and quarrying of stone, lime, clay, sand or other material on any premises and the burning of lime and manufacture of bricks;

(r) to prohibit, restrict or regulate the use of any land as a pond for the keeping or breeding of fish;

(s) to control and supervise, by registration, licensing or otherwise, including in proper cases by prohibition, a trade, business or industry which is of an obnoxious nature or which could be a source of nuisance to the public or a class of the public;

(t) to provide for the offences under this Act and any by-laws which may be compounded by the local authority, the persons who may compound, the limit of the sum of money to be collected by such local authority for compounding such offences and the procedure and forms to be complied with in compounding; and

A (u) in so far as they do not fall within any of the preceding paragraphs, to provide for all procedural and other matters which by this Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the provisions of this Act.

The impugned by-law 8(1) reads:

B

Mana-mana orang yang didapati berkelakuan dengan cara tidak sopan dalam sesuatu taman adalah melakukan suatu kesalahan.

Translation:

C

Any person found behaving in a disorderly manner in any park commits an offence.

[22] In submitting before us, the learned counsel for the applicants said (verbatim):

D

In the absence of specific words as to the by-laws on the indecent act, non-acceptable human conducts, indiscipline, ill-mannerism and to prohibit act such as kissing, hugging and immoral act was missing in s 102 from paragraph (a) to (u), we submit that s 8(1) Undang-Undang Kecil Taman (Wilayah Persekutuan) 1981 was ultra vires s 102 paragraph (a) to (u) of the Local Government Act 1976. The Datuk Bandar had infringed fundamental liberty against the applicants under art 5(1) of the Federal Constitution.

E **[23]** With respect, we are of the view that learned counsel for the Applicants took a simplistic approach and failed to appreciate the general aspect of s 102. Indeed there are two parts in that section. The first part is general in nature while the second is on specific areas. But learned counsel only focused on the second limb in his submission. Obviously, it did not occur to him the existence of s 26 of the

F Interpretations Acts 1948 and 1967 which provides that 'where power is conferred to make subsidiary legislation for a general purpose and also for any particular purposes incidental thereto, the enumeration of the particular purposes shall not derogate from the generality of the power conferred with reference to the general purpose.

G **[24]** Bearing therefore in mind the threefold function of this court in determining an issue as in the present case, we are of the view that based on the general nature of the first part of the section and in particular with the phrase 'as are necessary or desirable for the maintenance of the health, safety and well-being of the inhabitants or for the good order and government of the local authority area' and applying the connectivity test between the objects of the impugned by-law and s 102 the

H 'connection contemplated is real and proximate, not far-fetched or problematical' (see *Public Prosecutor v Pung Chen Choon*. In other words, the general nature of the section is wide enough to cover such matter as dealt with in the impugned by-law.

I **[25]** Indeed what amounts to 'behaving in a disorderly manner' depends on the prevailing circumstances, place and/or period of time. It is a question of fact to be determined by a trier of facts. But just as examples, if some of the users of a public park of a local authority begin to sing loudly in the middle of the night so as to disrupt the sleep of the inhabitants or they begin to remove their clothes in front of young children of the inhabitants or they begin to play a game that may expose the local inhabitants to danger without any regards to their safety, surely these activities

are not in consonant with the obligation of a local authority to ensure 'the maintenance of the health, safety and well-being of the inhabitants or for the good order and government of the local authority area'. Thus, in our view it is within the power of a local authority to legislate a by-law in order to cater for such situations. Surely, it is for the health, safety and well-being of the inhabitants of a local authority to disallow users of its public park behaving in a disorderly manner.

[26] We also note that in fact the critical words used in the impugned by-law are 'berkelakuan dengan cara tidak sopan' or in the English translation 'behaving in a disorderly manner' and not in such explicit terms as submitted by learned counsel. The by-law does not specifically state that 'kissing and hugging' in a public park is an offence per se. Anyway, whether such acts are within the ambit of the phrase 'behaving in a disorderly manner' is not an issue before us.

[27] From the submission of learned counsel, our impression is that he assumes that the allegations in the summons served on the applicants is a reflection of the meaning and purpose of the impugned by-law when in fact they are only allegations levelled by DBKL which in law is still required to prove them not only as facts but that those proved facts are within the meaning of and satisfy the ingredients of the by-law. It is also trite law that since the matter is criminal in nature to secure a conviction the burden of proof upon DBKL is beyond reasonable doubt.

[28] We are also in agreement with the learned DPP that para (f) read with para (t) of s 102 is wide enough to include the power to legislate the impugned by-law. From our overall reading of the provisions in the Parks (Federal Territory) By-laws 1981, it is quite obvious that they are enacted in relation to 'the establishment, regulation and management of' a public park. For instance, under by-law 3, it is an offence to commit any of the acts stated therein such as in item (f) 'climbs any wall, fence, structure or tree' or in item (v) 'uses any indecent or offensive language or behaves in an indecent or offensive manner'. Hence, the impugned by-law which makes it an offence for any person to behave in a disorderly manner in any of the public parks of DBKL is no more than another rule laid down by DBKL to regulate its public park.

[29] Learned counsel for the applicants placed much reliance on the decision of this court in*Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd and another appeal* [2005] 3 MLJ 97 to buttress his argument. But with respect, the facts and the specific nature of the provision of the legislation considered in that case set it apart from the present case. The issue before the court was whether the Palm Oil (Research Cess) Order 1979 promulgated by the Minister was ultra vires the parent act namely, the Palm Oil Research and Development Act 1979 in relation to the levying and collection of cess by the appellant from palm oil millers in respect of both crude palm oil ('CPO') and crude palm kernel oil ('CPKO') from the kernel of oil palm fruits. Attention of the court was focused on ss 2 and 14(1) of the 1979 Act juxta-positioned to the relevant provisions in the 1979 Order.

[30] Section 2 of the 1979 Act reads:

> In this Act, unless the context otherwise requires:
>
> 'Board' means the Malaysian Palm Oil Research & Development Board established under s 3;
>
> 'Minister' means the Minister for the time being charged with the responsibility for the oil palm industry;
>
> 'palm oil' means oil, whether in crude or further processed form, extracted from oil palm fruits and seeds.

[31] Section 14(1) states:

> The Minister may, after consultation with the Board and with the Minister of Finance, make orders for the imposition, variation or cancellation of a research cess on palm oil; and the orders may specify the nature, the amount and rate and the manner of collection of the cess.

[32] Meanwhile the relevant parts of the 1979 Order stipulates:

> (2) In this Order 'palm oil miller' means a person who carries on the business of extracting oil from oil palm fruits and/or seeds.
>
> (3) Every palm oil miller shall pay a cess of four ringgit for every metric ton or part of a metric ton of crude palm oil produced by him

[33] The critical questions that confronted the court in that case was whether the imposition of cess on CPO and CPKO consistent with s 14(1). For CPO, it was in the affirmative but negative for CPKO. The basic reasoning of the court is that the 1979 Act and the 1979 Order only made reference to seed and not kernel having accepted that seed and kernel could not be one and the same. Hence, if kernel was intended and not the whole seed, then the 1979 Act and the orders made thereunder would have contained clear words to that effect. 'In my view, the distinction between the seed and the kernel has to be expressed in clear terms for the purpose of imposing cess on CPKO. In the absence of such clear words, it would be unfair and inappropriate to construe the relevant provisions as having the effect of imposing cess on CPKO. In the circumstances, I find sufficient merit in respondent counsel's contention that levying cess on CPKO is, by itself, ultra vires the 1979 Act. And I may add, it is also ultra vires the 1979 Order', per Steve Shim (CJ Sabah & Sarawak).

[34] It should be noted that before making the distinction between seed and kernel the court also examined the difference in the process of extracting oil from the respective items.

[35] We say that the rationale in the foregoing case cannot be applied to the present case simply because the scopes of the provisions under consideration deal with different subjects. Further as discussed above, s 102 has not only the general proviso but there is also para (f) as well which is wide enough to encompass the impugned

by-law whereas s 14(1) of the 1979 Act is specific in definition as to the meaning of 'seed' not being synonymous to 'kernel'. One of their Lordships (Gopal Sri Ram JCA) in that case was also of the view that 'a provision in a statute conferring power on a member of the executive to enact subsidiary legislation must be construed strictly. This is particularly so where the subsidiary legislation is one that imposes a financial levy — call it a tax or charge or cess or whatever you may — upon the whole or any section of the public.' In the present case, there is no issue of imposing any form of tax or levy. Thus, the heavy reliance by learned counsel on that case is quite misplaced.

[36] Accordingly, we say that the impugned by-law is intra vires s 102 of the Act.

WHETHER THE IMPUGNED BY-LAW OR ITS EFFECT INFRINGES THE RIGHTS ENSHRINED IN ARTS 5 AND 8 OF THE FEDERAL CONSTITUTION

[37] We note that in the question posed there is no reference to art 8. However, in his submission, learned counsel for the applicants made reference to it. Thus, we will consider it albeit briefly.

[38] Learned counsel approached the issue in two prongs. Firstly, he said that as the impugned by-law is ultra vires s 102 enforcing it thus infringes the rights enshrined in art 5 of the Constitution. As we have now concluded that the impugned by-law is intra vires s 102, such surmise by learned counsel is unfounded as art 5 ends with a proviso of 'save in accordance with law' which has been judicially interpreted to confine only to 'enacted law' and excludes general concepts of law such as natural justice (see *Comptroller General of Inland Revenue v NP* [1973] 1 MLJ 165). As we find the enacted by-law to be valid, there is therefore no question of any infringement of the rights enshrined therein.

[39] Secondly, learned counsel submitted that the impugned by-law itself is unconstitutional as it impinges on the constitutional rights of the applicants as enshrined in arts 5 and 8 of the Constitution.

[40] The relevant clause in art 5 reads:

> (1) No person shall be deprived of his life or personal liberty save in accordance with law.

Article 8 cll (1) and (2) state:

> (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

[41] In respect of art 5(1) it was the contention of the learned DPP and not challenged by learned counsel for the applicants that the applicants were never arrested or detained. As such, we agree with the learned DPP that there is no question of deprivation of rights, life or personal liberty taking the meaning of that clause in a narrower sense (see *Aminah v Superintendent of Prison, Pengkalan Chepa, Kelantan* [1968] 1 MLJ 92).

[42] As earlier on alluded to, learned counsel for the Applicants insisted without elaboration that there was deprivation of life. He went on to say that the applicants should not be restrained from doing what they were accused of (that is kissing and hugging) as it was only an expression of love.

[43] At the risk of being repetitive, we again say that we are only determining whether the impugned by-law, which deals with prohibiting any person from behaving disorderly in the public park of DBKL, is ultra vires the Act or unconstitutional. For now, we are not considering specifically whether kissing or hugging in the public park of DBKL is within the ambit of the impugned by-law. That is for the trial court to decide applying matured consideration and thereafter any aggrieved party to the case has the right of appeal to the higher courts of this country.

[44] Reverting to cl 5(1), we say that even accepting the broad interpretation of the word 'life' in cl (1) of the said article to mean 'right to livelihood' which includes deprivation of one's reputation (see *Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2000] 3 MLJ 281), we cannot by any stretch of imagination conclude that by disallowing any person from behaving in disorderly manner as the impugned by-law stipulates, is a deprivation of one's life or livelihood or reputation. To do so would result in chaos to our society which is anathema to the concept of a civilized community.

[45] In respect of the rights referred to under the limb of personal liberty of the said clause, we do not think it is necessary for us to dwell too much into the jurisprudential aspect of it. Suffice it to stress here that the by-law is intended to apply only in the public parks of DBKL. Surely, as the keeper of its public parks, DBKL is entitled to lay down the rules to regulate their uses and more so in this case where the Act provides such power to DBKL. Hence, if a person does not wish to be subject to such regulations, as for instance, not to behave in disorderly manner, he or she is not obliged to enter any of the public parks to do what he or she wants to do. It would therefore be quite illogical to insist entry into the public park and then demanding unqualified personal liberty. The interest of other users who are equally entitled to invoke art 5(1) must also be respected.

[46] As regards art 8, judicial pronouncement on the scope of this article has been 'that 'equality before the law' requires that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decision whether or not to prosecute in a particular case for a particular offence should not be indicated by some irrelevant consideration. Article 8(1) does not forbid discrimination in punitive treatment between one class of individuals and

another class in relation to which there is some difference in the circumstances of the offence that has been committed.' (see *Nadarajah v PP* [2000] 4 MLJ 373; *Public Prosecutor v Tengku Mahmood Iskandar & Anor* [1973] 1 MLJ 128).

[47] Hence, the reliance on art 8 by learned counsel in our view has no merit as there is no assertion that the applicants were singled out by DBKL in relation to the enforcement of the impugned by-law. There was also no allegation that irrelevant consideration was taken into account when DBKL decided to issue the summons to the applicants.

[48] Accordingly, it is our judgment that the impugned by-law does not infringe any of the rights as enshrined in arts 5 or 8 of the Constitution.

CONCLUSION

[49] For the foregoing reasons, we answered the question posed in the negative and directed that the matter be reverted to the High Court for further action

Order accordingly.

Reported by Sally Kee